

REMARKS

By way of the present amendment, Applicants propose amending claims 23, 40, 54, and 64 to improve form. No new matter has been added by way of the proposed amendment. Claims 23-31, 39-45, and 47-68 are pending.

Claims 23, 40, 54, and 64 are proposed to be amended to recite a “method performed by one or more devices” in order to tie the methods to machines. MPEP 1206 states that “[a]mendments filed after the filing of a notice of appeal, but prior to the date of filing a brief, may be admitted only to: (A) cancel claims; (B) comply with any requirement of form expressly set forth in a previous action; (C) present rejected claims in better form for consideration on appeal; or (D) amend the specification or claims upon a showing of good and sufficient reasons why the amendment is necessary and was not earlier presented.”

The proposed amendment puts the claims in better form for consideration because the present amendment ties a process to another statutory class and therefore directs the claims to statutory subject matter under 35 U.S.C. § 101.

The amendment was not present earlier because the CAFC stated on October 30, 2008, after the filing of the Notice of Appeal on September 3, 2008, that “the machine-or-transformation test, properly applied, is the governing test for determining patent eligibility of a process under Section 101.” See *In re Bilski*. Therefore, the proposed amendment was not necessary until after the Notice of Appeal was filed.

In view of the foregoing amendments and remarks, Applicants respectfully request that the Examiner enter this amendment.

To the extent necessary, a petition for an extension of time under 37 CFR § 1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account No. 50-1070 and please credit any excess fees to such deposit account.

Respectfully submitted,

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